

Jacobson v Gartenberg
2015 NY Slip Op 31474(U)
August 4, 2015
Supreme Court, New York County
Docket Number: 154336/13
Judge: Cynthia S. Kern
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: Part 55

-----x
SHERYL JACOBSON,

Plaintiff,

Index No.

154336/13

-against-

DECISION/ORDER

MARK GARTENBERG and TRACY MANN,

Defendants.
-----x

HON. CYNTHIA KERN, J.S.C.

Recitation, as required by CPLR 2219(a), of the papers considered in the review of this motion for : _____

Papers	Numbered
Notice of Motion and Affidavits Annexed.....	<u>1</u>
Answering Affidavits and Cross Motion.....	<u>2</u>
Replying Affidavits.....	<u>3</u>
Exhibits.....	<u>4</u>

Plaintiff Sheryl Jacobson commenced the instant action alleging breach of a lease by defendants Mark Gartenberg and Tracy Mann. Plaintiff now moves for an order pursuant to CPLR § 3212 granting her summary judgment on her complaint. For the reasons set forth below, plaintiff's motion is denied.

The relevant facts are as follows. Plaintiff is the owner of the residential building located at 146 West 130th Street, New York, New York (the "building"), which contains three residential apartment units. From the fall of 2010 until May 2012, plaintiff resided in Apartment 1, a duplex apartment comprising of the first two floors of the building, which provides the only way to access the basement of the building. The basement contains the boiler for the building, the "key fob machine" as well as one gas meter and three electricity meters, one

for each of the three apartment units. Also during that time period, defendants, a married couple, rented from plaintiff Apartment 3 pursuant to a lease agreement. During the course of defendants' tenancy in Apartment 3, they became friendly with plaintiff and expressed interest in renting Apartment 1 if plaintiff ever moved out.

In or around 2012, plaintiff notified defendants that she would be moving to Shanghai, China for work and offered to rent defendants Apartment 1 at a reduced rate to compensate for the fact that the utilities would cost more because it was an "owner's unit" and notified defendants that the lease would include "the two floors only. No cellar." The provisions of the lease were discussed via e-mail and plaintiff informed defendants that they were "welcome to store" items in the basement. Thereafter, the parties entered into the lease for Apartment 1 (the "Lease"), effective June 1, 2012, for a three-year term.

On or about June 5, 2012, five days into the Lease term, plaintiff's fiancé, Mark Warner, notified defendants after seeing their belongings in the basement that there was an insurance and liability issue with defendants storing items in the basement and that plaintiff's insurer advised her to only allow access to the basement to "authorized persons" such as the building manager and plaintiff's brother, Brian Jacobson. Mr. Warner informed defendants that they could continue to have access to the basement for safety reasons and so that they could read the meters but that they could not store their belongings there. Thereafter, defendants removed their personal belongings from the basement and stated that they had no intention of using the basement for the remainder of their tenancy.

From June 2012 through December 2012, Mr. Jacobson was the acting supervisor for the building while plaintiff was in China and as such, he provided and arranged most maintenance

services for the building. During that time, Mr. Jacobson occasionally needed access to the basement for the purposes of making key fobs and providing access to certain maintenance workers, such as the heating contractors and plumbers. Plaintiff alleges that Mr. Jacobson would obtain permission from defendants prior to entering Apartment 1 for any reason, including obtaining access to the basement but that nonetheless, defendants voiced displeasure with allowing access to Apartment 1 or the basement on numerous occasions and insisted on being present when any maintenance worker, including Mr. Jacobson, was in either Apartment 1 or the basement, which made it difficult to schedule maintenance of the building. Further, in or around August 2012, plaintiff became interested in selling the building and engaged Halstead Property to arrange for the sale. While defendants originally granted access to Apartment 1 to show prospective buyers and for the real estate brokers to take pictures, plaintiff alleges that on November 26, 2012, they revoked such access and further instructed Halstead Property to refrain from posting any pictures of Apartment 1. Plaintiff alleges that because she was unable to show Apartment 1, the largest of the three apartments, she was unable to sell the building and had to take it off the market.

In or around December 2012, plaintiff had her personal belongings removed from the basement and put into storage. Thereafter, Mr. Jacobson decided to move out of state and thus, would be unable to perform maintenance services for the building. Plaintiff retained HEC, a management company, to provide maintenance services for the building, effective January 1, 2013. On or about December 18, 2012, Mr. Jacobson contacted defendants to schedule a time during which he could teach HEC how to use the key fob machine located in the basement. When defendants failed to respond, Mr. Jacobson followed up on December 20, 2012.

Defendants then refused Mr. Jacobson access to the basement "except in the case of an emergency, until an agreement regarding the terms of the basement use [had] been finalized." They further advised Mr. Jacobson to direct all future communications to their counsel and moved some of their personal belongings into the basement.

Thereafter, plaintiff commenced the instant action against defendants alleging causes of action for, *inter alia*, breach of the Lease and seeking a declaratory judgment that defendants are in violation of the Lease, a judgment ejecting defendants from possession of the basement, an order compelling defendants to provide access to Apartment 1 to plaintiff and plaintiff's agents at all reasonable times for the purpose of making repairs, additions or alterations, including accessing the basement for any proper purpose as authorized by the Lease, a money judgment against defendants in an amount equal to the reasonable value of the use of the basement for storage and attorney's fees. Plaintiff now moves for an Order pursuant to CPLR § 3212 granting her summary judgment on her complaint.

On a motion for summary judgment, the movant bears the burden of presenting sufficient evidence to demonstrate the absence of any material issues of fact. *See Alvarez v. Prospect Hosp.*, 68 N.Y.2d 320, 324 (1986). Summary judgment should not be granted where there is any doubt as to the existence of a material issue of fact. *See Zuckerman v. City of New York*, 49 N.Y.2d 557, 562 (1980). Once the movant establishes a *prima facie* right to judgment as a matter of law, the burden shifts to the party opposing the motion to "produce evidentiary proof in admissible form sufficient to require a trial of material questions of fact on which he rests his claim." *Id.*

It is well settled that construction of a written contract is a question of law, appropriately

decided by the court on a motion for summary judgment, as long as the contract is unambiguous and the intent of the parties can be determined from the face of the agreement. *Mallad Constr. Corp. v. County Fed. Sav. & Loan Assn.*, 32 N.Y.2d 285, 291 (1973). However, “[r]esolution by a fact finder is required where...interpretation of a contract term is susceptible to varying reasonable interpretations and intent must be gleaned from disputed evidence or from inferences outside the written words.” *Time Warner Entertainment Co. v. Brustowsky*, 221 A.D.2d 268 (1st Dept 1995).

As an initial matter, that portion of plaintiff’s motion for summary judgment on her claim for breach of the Lease based on her assertion that defendants are improperly occupying the basement is denied as there exists an issue of fact as to whether the basement is part of the leased premises. Pursuant to the Lease, defendants agreed to rent the residential unit located at “146 West 130th St. Apt. 1 New York, NY 10027 (hereinafter referred to as the ‘Premises’).” However, the Lease does not provide a description of “Apt. 1” or whether “Apt. 1” includes the use of the basement, which could only be accessed from inside Apartment 1. Thus, this court finds that the terms “Apt. 1” and “Premises” as used in the Lease are ambiguous and the intent of the parties cannot be determined from the face of the Lease. As the court would need to glean the parties’ intent from the evidence provided in the form of e-mails and the parties’ testimony and thus, use inferences outside the written words of the Lease, the determination of whether defendants are improperly occupying the basement pursuant to the Lease must be made by the trier of fact.

Additionally, that portion of plaintiff’s motion for summary judgment on her claim for breach of the Lease based on defendants’ alleged actions in preventing plaintiff and plaintiff’s

agents from accessing Apartment 1 and the basement is denied as there exists an issue of fact as to whether defendants' denial of access to Apartment 1 and the basement was reasonable.

Pursuant to Paragraph 14 of the Lease,

Landlord and Landlord's agents shall have the right at all reasonable times during the term of this Agreement and any renewal thereof to enter the Premises for the purpose of inspecting the Premises and all buildings and improvements thereon. And for the purposes of making any repairs, additions or alterations as may be deemed appropriate by Landlord for the preservation of the Premises or the building. Landlord and its agents shall further have the right to exhibit the Premises and to display the usual "for sale", "for rent" or "vacancy" signs on the Premises at any time within forty-five (45) days before the expiration of this Lease. The right of entry shall likewise exist for the purpose of removing placards, signs, fixtures, alterations, or additions that do not conform to this Agreement or to any restrictions, rules or regulations affecting the Premises.

Defendants do not dispute that they refused access to plaintiff's agents on certain occasions.

However, they assert that they refused access to Apartment 1 and thereby the basement because plaintiff's agents requested to gain access to the Apartment at unreasonable times. Specifically, they assert that plaintiff's agents requested access on Mr. Gartenberg's birthday or during the holidays when they would not be available. Additionally, defendants assert that their refusal of access to Apartment 1 to allow plaintiff's real estate agent to show the unit and take pictures of the unit during the fall of 2012 in order to sell the building was not a breach of the Lease as Paragraph 14 of the Lease only requires them to allow plaintiff and her agents to exhibit the "Premises" within forty-five days before the expiration of the Lease, which would be anytime after April 17, 2015 but not before. Thus, plaintiff's motion for summary judgment must be denied as there exist issues of fact as to whether defendants' denial of access to Apartment 1 and the basement was reasonable.

Accordingly, plaintiff's motion for summary judgment is denied. This constitutes the decision and order of the court.

Date: 6/4/15

Enter:

CK

J.S.C.

CYNTHIA S. KERN
J.S.C.